



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON, DC 20310-0111

March 26, 2003

MEMORANDUM THRU ASSISTANT SECRETARY OF THE ARMY
(INSTALLATIONS AND ENVIRONMENT)

FOR ASSISTANT CHIEF OF STAFF, INSTALLATION MANAGEMENT

SUBJECT: Installation Management Exemption Requests

Reference:

a. Memorandum, Assistant Chief of Staff, Installation Management (ACSIM), (CFSC-SP), subject: Request for Exemption From the A-76 Process in Order to Employ Uniform Funding and Management (UFM) of Morale, Welfare, and Recreation (MWR) Programs, Contained in the Bob Stump National Defense Authorization Act for Fiscal Year 2003, to Meet the Intent of the Third Wave, 12 January 2003.

b. Memorandum, ACSIM (DAIM-ZA), subject: Deferral of Third Wave Implementation Planning for Headquarters, Installation Management Agency and Regions – ACTION MEMORANDUM, 14 January 2003.

c. Memorandum, ACSIM (DAIM-ZA), subject: Public Works Exemption Request, 12 January, 2003.

d. Memorandum, ACSIM (DAIM-ZA), subject: Request for Exemption for Environment and Natural Resources Services (E120) at the U.S. Army Environmental Center (USAEC), Aberdeen Proving Ground, Maryland, 14 January 2003.

e. Memorandum, ACSIM (DAIM-MD), subject: Designation of Garrison Management Function, Career Field 29, as Government in Nature.

Function. This request includes military and civilian employees in the infrastructure performing installation management functions.

Decision (General). With the exception of mobilization functions in power projection platform installations and construction, maintenance, and repair of buildings and structures, the installation management function is, generally, not a core competency of the Army. Some aspects of the function required by Title 10, U.S. Code, Section 3013 can not be privatized or divested without specific enabling legislation (and such enabling legislation has been obtained in the case of utilities and housing privatization). Some functions that require performance by Government officials (such as public affairs; the administration of the Uniform Code of Military Justice (UCMJ); and

disbursement) may conceivably be consolidated at a higher level organization and need not be performed at the installation level, in the event the installation function becomes a Government-owned contractor operated function. In addition, Title 10, U.S. Code, Section 2465 provides in general that the security-guard and firefighter functions in installations located in the United States must be performed by Government employees unless the installation becomes a contractor operated facility, or unless the basis for arranging for performance by local municipalities afforded by the section 332 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107-314 applies. However, there are complexities affecting any effort to move in the direction of a contractor operated installation, such as, the administration of the UCMJ where there are tenant organizations with significant numbers of assigned military; the impact of liabilities arising from the application of State and Federal environmental laws to a contractor operated as contrasted to a Government operated installation; and the differing terms of each land grant or charter providing proprietary, concurrent or exclusive legislative jurisdiction and administrative authority over the military installation from a State or local Governmental entity. There is no basis for military performance of this function, except to the degree UCMJ authority must be administered locally and cannot be absorbed by a tenant organization or regionalized. Implementation plans should seek to maximize movement in the direction of contractor-operated facilities and whole base studies, depending on the outcome of an analysis of these issues. Residual organizations that were created without regard to the Army's FAIR Act determinations of inherently Governmental function should be competed in any re-competition of the public works function. I am not altering the inherently Governmental determinations made under the FAIR Act by the prior administration as these apply to the installation management function. Issues raised about the timing of implementation plan are not relevant to the exemption process, but are more relevant to the development of implementation plans. The issue of re-competition of a function is not being decided in the exemption process but by the issuance of a new OMB Circular A-76, which is anticipated to require re-competition of commercial functions. The fact that non-appropriated funds are used to perform some installation functions pertaining to morale, welfare and recreation functions is not a basis for exemption from developing a Third Wave implementation plan. The selection of an alternative to A-76 to perform aspects of the morale, welfare and recreation functions is not a basis for exemption from developing an implementation plan.

The Installation Management Agency and the U.S. Army Environmental Center (USAEC) are not performing inherently Governmental functions. The Installation Management Activity is not making decisions that involve substantial discretionary decision-making. The final prioritization determinations are presumably made at a higher level within the Department than the Center, which may be viewed as more engaged in the development of recommendations that relate to prioritizing environmental projects for installations. Moreover, interacting with Federal, state, and

local regulatory agencies concerning compliance with environmental laws does not involve substantial discretionary decision making, as these matters are highly circumscribed by law, rule and regulations. However, USAEC is exempted as a matter of policy because of the significant conflict of interest issues that might arise from contracting out environmental compliance functions and the substantial impact of such compliance on Army core competencies.

Contracting officer technical representatives do not have authority to exercise the inherently Governmental functions pertaining to contract administration. The mere supervision of Government employees performing a commercial function is not inherently Governmental.

At enclosure are instructions on how to implement this decision in the Inventory of Commercial and Inherently Governmental Activities (including the Federal Activities Inventory Reform Act Inventory), to be developed by Deputy Chief of Staff (DCS), G-1 in coordination with our responsible staff officers.

Requestor's Position on Issues. The functions that are addressed in this exemption request consist of a variety of installation-level activities. The U.S. Army Environmental Center contends that their function is inherently Governmental and "poses a force management risk," due to contract management, supervisory and highly technical tasks performed. The Assistant Chief of Staff for Installation Management claims that the Garrison Management function is inherently governmental because operating installations is a core process in the Army. The Assistant Chief of Staff for Installation Management also believes that outsourcing the Installation Management Agency (IMA) and Regions functions would pose operational and institutional risks because IMA's primary mission is to "support the mission readiness of the warfighting components from mobilization through deployment and sustainment to redeployment and demobilization." The Deputy Assistant Secretary of the Army (Human Resources) requests an exemption from the A-76 process in order to employ Uniform Funding and Management (UFM) of Morale, Welfare and Recreation (MWWR) Programs as this would transform these functions to Non-Appropriated fund activities which are not subject to FAIR Act reporting. The requestor also claims that the functions performed by the Assistant Chief of Staff for Installation Management (OACSIM) Facilities Policy Division are inherently Governmental and a core function due to the exercise of management authority over installation policy, programs, property, funds and employees. An exemption is also requested for the OACSIM Army Housing Division based on the contention that this function is an inherently Governmental activity, although the reasons for this conclusion are not clearly articulated. An exemption is also requested for the functions performed by the Integrated Facilities System (IFS) Program Manager on the grounds that outsourcing would lead to institutional risk, inappropriate personal services contracting and institutional and organizational conflicts

of interest. An exemption is also requested for Installation, Base or Facility Management performed by Installation directors of public works on the grounds that all implementation scenarios will result in institutional risks, conflicts of interest, personal services contracts and on the ground that the function is inherently governmental. An exemption is requested for the Installation Housing Manager function on the grounds that the function is inherently Governmental and that any implementation plan would result in lack of accountability for Army resources and conflicts of interest. Finally, an exemption is requested for Engineering Plans and Services performed by installation Directorate of Public works on the basis that it is inherently Governmental.

Standard of review. The senior HQDA functional official for a function must describe and substantiate specifically how preparation and implementation of a Third Wave implementation plan for each course of action poses substantial and specific risks to a core war fighting mission of the Army (i.e., a core competency) or violates a statutory requirement affecting a function. The following are risk factors to evaluate this request: force management risk; operational risk; future challenges; and institutional risk. How these risk criteria are applied may vary based on each course of action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to another agency; divestiture). Therefore, exemption requests and decisions must assess the potentially adverse impact of each course of action.

Core Competency Relevant to Risk Issue. Aspects of the installation management function are included as tasks within the six recognized core competencies of the Army, as provided for in Army Field Manual 1 and The Army Plan: Shape the Security Environment (Deter Forward); Prompt Response; Forcible Entry Operations; Mobilize the Army; Sustained Land Dominance; or Support Civil Authority. However, only the power projection platform function in those installations needed for mobilizing the Army directly fit within the above core competencies. Therefore, the risk criteria pertaining to the impact of an implementation plan or sourcing decision as it affects the Army's war-fighting competencies are not directly relevant to most installation management functions. USAEC's functions, however, are crucial to the Army's war-fighting competency as it builds and executes a strategy to ensure continued access to the lands that are vital to soldier training and weapons testing

Statutory Requirements Relevant to Risk Issue. Title 10, U.S. Code, Section 3013, provides that the Secretary of the Army is responsible for the functions of mobilizing the Army, administering (including the morale and welfare of personnel), and the construction, maintenance, and repair of buildings and structures. Therefore, these functions can not be divested, transferred or privatized absent specific enabling legislation, as was obtained in the case of utilities and housing privatization (See, e.g., Title 10, U.S. Code, Sections 2688s and 2871-2885).

Inherently Governmental Determination Relevant to Outsourcing Issue. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments while making decisions for the Government. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government employees. This concept does not include providing advice to Federal Government officials.

The exercise of discretion in making a decision must be substantial in nature in order for the decision to involve an inherently Governmental function. Prior Army FAIR Act determinations opined that the installation management function is, for the most part, not inherently Governmental because it does not involve substantial discretionary decision-making. The decision-making is not substantial at the installation level and at the level of the U.S. Army Environmental Center and the Installation Management Activity because the decisions are substantially circumscribed by laws, rules and regulations. In addition, the FAIR Act statutory definition includes the following functions as not inherently Governmental: any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services. Final prioritization determinations with respect to environmental projects are presumably made at a higher level within the Department than the Center, which may be viewed as more engaged in the development of recommendations that relate to prioritizing environmental projects for installations. Moreover, interacting with Federal, state, and local regulatory agencies concerning compliance with environmental laws does not involve substantial discretionary decision-making, as these matters are highly circumscribed by law, rule and regulations.

Statutes Relevant to Sourcing Decision. Title 10, U.S. Code, section 2465 provides in general that the security-guard and firefighter functions in installations located in the United States must be performed by Government employees unless the installation becomes a contractor operated facility, or unless the basis for arranging for performance by local municipalities afforded by the section 332 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107-314 applies. In addition, there are complexities affecting any effort to move in the direction of a contractor operated installation, such as, the administration of the UCMJ where there are tenant organizations with significant numbers of assigned military; the impact of liabilities arising from the application of State and Federal environmental laws to a contractor operated as contrasted to a Government operated installation; and the differing terms of each land grant or charter providing proprietary, concurrent or exclusive legislative jurisdiction and administrative authority over the military installation from a State or local Governmental entity. In addition, installation management

functions are subject to the normal process provided by Section 2461, Title 10 and Section 8014 of appropriations acts mandating public-private competition in certain circumstances, subject to the standard exceptions for 10 or fewer civilian employees, and preferential procurement programs.

Personal Services. Insofar as few installation management positions are inherently Governmental, the issue of a potential personal services arrangement arising from supervision by an official making inherently Governmental decisions is not relevant.

Conflicts of Interest. USAEC plays a central role in negotiating with federal and state environmental regulators about rules and policy, as well as site-specific studies, permits, and orders that could otherwise impede the Army's continued access to its training and testing ranges. It is essential to have Army employees engaged in these negotiations with regulators because they have a stake in the outcome, and because of serious concerns with turning over these responsibilities to contractors whose financial interests are at odds with the objectives of minimizing delays and costs of environmental compliance.

Military conversions. Insofar as the installation management function is, for the most part, not a core war-fighting competency, the basis for arguing for military performance in the infrastructure is weak. The central issue (according to the Inventory Guide, Enclosure 6, page 6-9) is whether adequate performance of the function in the infrastructure requires military unique knowledge and experience that can only be derived from *recent* first-hand involvement in military activities – i.e., through commanding military forces or conducting or participating in military operations or exercises. This knowledge and experience must be more substantial than familiarity with doctrine, tactics, operations, or regulations; capabilities that can be developed by civilians; or, advice military retirees can provide based on their knowledge and experiences.

There is no basis for military performance of this function, except to the degree UCMJ authority must be administered locally and cannot be absorbed by a tenant organization or regionalized. However, there are complexities affecting any effort to move in the direction of a contractor operated installation, such as, the administration of the UCMJ where there are tenant organizations with significant numbers of assigned military; and the differing terms of each land grant or charter providing proprietary,

concurrent or exclusive legislative jurisdiction and administrative authority over the military installation from a State or local Governmental entity.

A handwritten signature in dark ink, appearing to read "Reginald J. Brown", written in a cursive style.

Reginald J. Brown
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosure

CODING RULES for Installation Management, MWR, and Environmental Management

1. Environmental Management Agencies (all military and civilians)
 - a. US Army Environmental Center (W3V8AA) Code M – DoD Management Decision
 - b. US Army Environmental Policy Institute (W467AA) Code M – DoD Management Decision
2. US Army Installation Support Management Activity (W4YNAA)
 - a. All military and civilians Code R – Subject to Review
3. Morale, Welfare, and Recreation, including the Community and Family Support Center (CFSC)
 - a. All military and civilian in CFSC (W4RHAA) Code X – Candidates for alternatives to A-76
 - b. All personnel in the following MDEPS: Code X – Candidates for alternatives to A-76
 1. QACS Army Community Services
 2. QCCS Chile Development Services
 3. QYDP Youth Development Program
 4. QDPC Community Support Activities
 5. FAPC Community and Family Support Center
4. Garrison Commanders and immediate staff (does not include Special Staff):
 - a. Positions will be identified by TDA paragraph P – Pending Restructuring
5. All other installation personnel
 - a. Positions identified by BOS/SRM APE R – Subject to Review
 - b. Positions identified by UIC R – Subject to Review